One further point remains. Can the plaintiffs sue? Section 14(3) of the Copyright Act 1969 provides that "infringements of copyright shall be actionable at suit of the owner of the copyright". Subsection (7) gives the meaning of "owner of the copyright" as "the first owner, an assignee or an exclusive licensee." Section 12(1) provides that copyright conferred by section 6 shall vest initially in the author. By section 2(1) "author" in the case of a cinematograph film means the person by whom the arrangements for the making of the film were undertaken. TVB and RTV were the makers of the films, so they can sue. Golden Star as the exclusive licensee also can sue: section 14(3) and (7).

In case I am wrong and it turns out that Golden Star have merely a licence and not an exclusive licence, I still say they are proper parties so long as they have joined TVB and RTV as co-plaintiffs: see *Halsbury's* Laws of England, 4th ed., vol. 9, p. 562, para. 880. In fact they are the plaintiffs in the present case. "I do not see why a non-exclusive licensee is not a proper plaintiff in proceedings for breach of copyright provided he joins the owner of the copyright." – said Bowen C.J. in *Young* v. *Odeon Music House*[28].

For the reasons which I have given, I grant the order that is sought.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Mah-Kok & Din.*

KOPERASI SERBAGUNA CUEPACS TANGGUNGAN BHD. v. CITY INVESTMENT SDN. BHD.

[O.C.J. (Wong Kim Fatt J.C.) May 10, 1982]
[Seremban – Civil Suit No. 189 of 1980]

Land Law – Sale and purchase agreements for 85 housing lots – Dispute – Plaintiffs/purchasers lodged private caveat against said 85 housing lots and also another 100 lots not sold to plaintiffs – Defendants/vendors applied for removal of caveats lodged against 100 lots – Caveats removed by court – Plaintiffs' application for injunction disallowed – National Land Code, s. 329(2)

Practice and procedure – Injunction – Caveats lodged against properties not purchased by caveator – Caveats removed – Injunction against removal of caveats disallowed.

There were 2 written agreements between the defendants/vendors and the plaintiffs/purchasers in which the plaintiffs purchased a total of 85 housing lots from the defendants. The plaintiffs paid $472,000.00 as land purchase price and another sum of $674,300.00 as land development price. Subsequently a dispute arose between the parties over the two agreements. The plaintiffs entered a private caveat against the said 85 lots. The defendants did not dispute that the plaintiffs had caveatable interests in these 85 lots, and did not take any steps to remove the said caveats. The plaintiffs also lodged private caveats against another 100 lots of land not purchased by them but to which they claimed an interest because they contended that the defendants were liable under the agreements to offer these lots in substitution of the 85 lots should any of these 85 lots be not acceptable by the plaintiffs. The defendants' application for the removal of the caveat in respect of the 100 lots was allowed by Ajaib Singh J. The plaintiffs appealed to the Federal Court in F.C.C.A. No. 99 of 1980.

The plaintiffs subsequently applied by *ex parte* summons-in-chambers in the present civil suit for an order of injunction.

Ajaib Singh J. granted the injunction. After obtaining the *ex parte* injunction, the plaintiffs withdrew their appeal to the Federal Court in F.C.C.A. No. 99 of 1980.

The defendants sought for the discharge of the injunction.

Held, allowing the defendants' application: (1) the injunction obtained in the present case appears not to be in the nature of a *Mareva* injunction. There was no evidence to show that the defendants were disposing of assets with a view of defeating a possible judgment in favour of the plaintiffs. It is somewhat akin to a caveat as it restrains the defendant from selling or otherwise dealing with the 100 lots in question;

(2) by withdrawing their appeal in the Federal Court, the plaintiffs had conceded that they had no caveatable interest in the 100 lots of land which they had not purchased. What they had failed to achieve by caveats they could not achieve by injunction based on the same ground;

(3) if the injunction were a second caveat based on the same ground, it could not have been registered owing to the provisions of s.329(2) of the National Land Code;

(4) in applying for an *ex parte* injunction, the applicant is duty bound to disclose in his affidavit all material facts fully and frankly. The plaintiffs had, however, failed to disclose in the affidavit in support of the *ex parte* application for injunction, that the private caveats entered by the plaintiffs in respect of the 100 lots of land had been removed by order of Ajaib Singh J. Had this fact been brought to his attention, the learned judge would not have granted the injunction, for to do so would be to defeat his own order for the removal of the private caveats;

(5) on the balance of convenience the injunction must therefore be discharged.

Editorial Note: Another aspect of this case regarding the question of whether the learned Judicial Commissioner had any jurisdiction to proceed with the trial from the stage at which the previous Judge left it is discussed in detail in F.C.C.A. No. 117 of 1982 at [1983] 2 M.L.J. 33. The appeal proper was argued before the Federal Court (Coram as previously) on March 28, 1983. The said appeal was dis-

missed but there was no written Judgment when the Federal Court dismissed the appeal proper.

Cases referred to:

(1) *Zainal Abidin* v. *Century Hotel Sdn. Bhd.* [1982] 1 M.L.J. 40; 260.

(2) *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509; [1980] 1 All E.R. 213.

(3) *Sari Artists Film Productions Sdn. Bhd.* v. *Malaysia Film Industries Sdn. Bhd.* [1974] 1 M.L.J. 123.

(4) *Negocios Del Mar S.A.* v. *Doric Shipping Corporation S.A.* [1979] 1 Lloyd's Rep. 331.

(5) *Third Chandris Shipping Corporation* v. *Unimarine S.A.* [1979] 2 All. E.R. 972.

CIVIL SUIT.

P.P. Royan for the applicants/defendants.

Datin Saraswathy Devi for the respondents/plaintiffs.

Cur. Adv. Vult.

Wong Kim Fatt J.C. (read by Peh Swee Chin J.C.): This is an application by the defendants, which are licensed housing developers, for an order to discharge the *ex parte* injunction restraining the defendants by themselves or by their servants or agents whosoever from agreeing to sell or selling or transferring or in any way dealing with the 100 pieces of land not purchased by the plaintiffs in the housing project in which the plaintiffs had by two written agreements purchased a total of 85 housing lots of land. When the application came up for hearing before me on April 2, 1982, learned counsel for the plaintiffs raised a preliminary objection that I had no jurisdiction to hear it on the ground that it was first heard by Abdul Razak J., who had not given his decision. Learned counsel for the defendants submitted that the plaintiffs had filed fresh affidavits for hearing before me. He referred to Order 35, rule 11, of the Rules of the High Court, 1980, and submitted that the learned judge had not concluded the case, and that I had jurisdiction to hear the application.

The short answer to that objection is that upon his transfer from Seremban to Kuala Lumpur Abdul Razak J. had indicated through his Secretary, who had minuted the file accordingly, that he was unable to conclude the case. I had spoken to the learned judge personally on March 31, 1982, and he indicated that I should hear this application afresh. In my opinion this case falls within the scope of 'other cause' in Order 35, rule 11. Accordingly, I ordered the application to be heard *de novo* before me based on the affidavits filed in court.

The background to the present application may be stated briefly as follows. By an agreement in writing dated November 24, 1976, entered into between the defendants as vendors and the plaintiffs as purchasers, the plaintiffs purchased 60 terrace building lots in that piece of undivided land known as Lot 3962, held under Grant No. 15907, Mukim of Rasah, District of Seremban, measuring approximately 50 acres, subject to the terms and conditions contained in the agreement. By another agreement in writing of the same date between the same parties, the plaintiffs agreed to purchase another 11 bungalow building lots and 14 detached building lots respectively in the said Lot 3962, again subject to the terms and conditions in the agreement. It is not in dispute that under these two agreements, the plaintiffs had paid the sum of $472,000.00 as land purchase price and another sum of $674,300.00 as land development prices. The defendants subsequently applied for and obtained sub-division and qualified titles to the said Lot 3962. A dispute arose between the parties in respect of the 85 lots purchased by the plaintiffs concerning the interpretation of certain clauses of the two agreements, which should be dealt with at the trial of the suit.

The plaintiffs then entered a private caveat in respect of all the said 85 lots. The defendants, however, did not dispute that the plaintiffs had caveatable interests in these 85 lots. Accordingly, the defendants did not apply or take any steps to remove the caveat. The plaintiffs also maintained that they had a registrable interest in respect of the said 100 lots of land and they accordingly entered private caveats in respect of all these 100 lots not purchased by them but to which they claimed an interest because they contended that the defendants were liable under the agreements to offer these lots in substitution of the 85 lots should any of these 85 lots be not acceptable by the plaintiffs. The defendants then applied to this Court by Originating Motion No. 31 of 1980 for the removal of the caveats in respect of the 100 lots. The application came up for hearing before Ajaib Singh J., who stated that he had no dificulty in arriving at the conclusion that the defendants were entitled to an order for the removal of the caveats on the 100 lots which were not sold to the plaintiffs. The reasons for removing the caveats were stated in the judgment of the learned judge as follows:

"There was no basis on which the respondents could make any legitimate claim under section 323 in respect of the 100 lots not purchased by them. The lots in question were not the subject-matter of any agreement of sale nor were they related in any way to the performance of the two agreements whereby the applicants had sold 85 lots to the respondents. The dispute which the parties are having over the 60 terrace and 11 bungalow lots can be of no avail to the respondents. Non-compliance with any term or condition in the agreements which the parties had executed on November 24, 1976 may give rise to a cause of action against the party in default but any non-compliance on the part of the applicants cannot be a ground on which the respondents may base their claim for the entry of private caveats on the 100 lots which have nothing to do with the two agreements."

Being dissatisfied with that decision of the learned judge, the plaintiffs appealed to the Federal Court in Federal Court Civil Appeal No. 99 of 1980.

The plaintiffs subsequently applied by *ex parte* summons-in-chambers in the present civil suit to this Court for an order of injunction as aforesaid. The main ground for the application appears to be that the plaintiffs were afraid that the remaining lots in the housing project may be disposed of by the defendants which are a limited company with no substantial property against which the plaintiffs may levy execution or which may be substituted for the lots purchased by the plaintiffs. The second ground is that the defendants had not offered alternative lots as required under the terms of the two agreements. In the circumstances Ajaib Singh J. granted the injunction as prayed. After obtaining the *ex parte* injunction, the plaintiffs withdrew their appeal to the Federal Court in the said Appeal No. 99 of 1980. Shortly thereafter the defendants applied to the Court to have the injunction discharged. As stated earlier on, the application first came up for hearing before Abdul Razak J. in the Court.

The crux of the contention by learned counsel for the defendants for the discharge of the injunction may be stated as follows. In applying for the *ex parte* injunction the plaintiffs omitted to mention a material fact that the plaintiffs' private caveats were ordered to be removed by the Court and that they subsequently withdrew their appeal in the Federal Court. If the injunction was in the nature of a *Mareva* injunction then the plaintiffs had not complied with the conditions for obtaining such an injunction. If the injunction obtained by the plaintiffs was in the nature of an attachment again they had not fulfilled the requirements of section 19 of the Debtors Act, 1957 (Revised-1981). The 85 housing lots purchased by the plaintiff had been allotted to them and had been accepted by them.

Learned counsel for the plaintiffs argued that no building plans had been approved and that building contracts submitted by the defendants had been varied in material terms. The plaintiffs had an interest in the 100 lots restrained by the injunction as these lots should be offered as substituted lots to the plaintiffs under the terms of the two agreements. She further contended that these substituted lots had been offered and accepted by the plaintiffs and therefore should not be released from the injunction. There is a real question to be tried in the suit and therefore the *status quo* of the parties should be maintained. If the 100 lots were to be released from the injunction the defendants would dispose of them quickly leaving no assets to be attached by the plaintiffs.

In considering whether or not the injunction should be discharged, the question is whether the plaintiffs had an interest in the 100 lots of land which must be restrained by an injunction. They were previously protected by private caveats which had been removed. The injunction may be said to act *in personam* while the caveat *in rem*, but the common effects are the same, that is the restraint of dealings affecting these 100 lots of land. In an appeal from the decision of the High Court in *Zainal Abidin* v. *Century Hotel Sdn. Bhd.*,[1] Raja Azlan Shah C.J. (Malaya), in a judgment dated January 29, 1982 in the Federal Court (F.C.C.A. No. 189 of 1981), held that the *Mareva* injunction is applicable in Malaysia and that a defendant is not called upon to prove its solvency the moment it becomes a defendant. The injunction obtained in the present case appears not to be in the nature of a *Mareva* injunction (see *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.*[2] for there is no evidence to show that the defendants are disposing of assets with a view to defeating a possible judgment in favour of the plaintiffs. It is somewhat akin to a caveat in the circumstances of this case in that it restrains the defendants from selling or otherwise dealing with the 100 lots in question. In my judgment, by withdrawing their appeal in the Federal Court, the plaintiffs had conceded that they had no caveatable interest in the 100 lots of land which they had not purchased. What they had failed to achieve by caveats they cannot now achieve by injunction based on the same ground. If the injunction were a second caveat based on the same ground, it could not have been registered owing to the provisions

of section 329 (2) of the National Land Code, 1965. On this ground alone the balance of convenience is in favour of the defendants and the injunction must therefore be discharged.

There is another ground why the injunction should be discharged, i.e. in the affidavit in support of the *ex parte* application for injunction, it was not disclosed that the private caveats entered by the plaintiffs in respect of the 100 lots of land had earlier on been removed by order of Ajaib Singh J. There is nothing in his notes of hearing to show that counsel had brought this material fact to his attention. Had this fact been brought to his attention, the learned judge would not have granted the injunction, for to do so would be to defeat his own order for the removal of the private caveats. The law is clear that in applying for an *ex parte* injunction, the applicant is duty bound to disclose in his affidavit all material facts fully and frankly. (see *Sari Artists Film Productions Sdn. Bhd.* v. *Malaysia Film Industries Sdn. Bhd.*[3] *Negocios Del Mar S.A.* v. *Doric Shipping Corporation S.A.*[4] and *Third Chandris Shipping Corporation* v. *Unimarine S.A.*[5])

It is not necessary for me to deal with other grounds. I must make it clear that in deciding this application, I have not in any way dealt with the merits of the suit which is fixed for hearing soon.

For the above reasons, I would allow this application with costs.

Application allowed.

Solicitors: *Shook Lin & Bok; Datin Saraswathy Devi.*

GANESAN v. PUBLIC PROSECUTOR

[O. Cr. J. (Mohamed Dzaiddin J.) April 27, 1983]
[Kuala Lumpur – Criminal Application No. 7 of 1983]

Criminal Law & Procedure – Bail – Charge of corruption – 3 years' imprisonment sentence – Refusal to grant bail by lower court – Factors to consider in cases where a term of imprisonment has been imposed – Prevention of Corruption Act 1961, s. 4(a) – Criminal Procedure Code, s. 311

Bail – Refusal to grant bail by lower court – Factors to consider in cases where a term of imprisonment has been imposed.

The applicant in this case was charged for an offence under section 4(a) of the Prevention of Corruption Act 1961. At the conclusion of the case he was convicted and sentenced to 3 years' imprisonment by the learned President, Sessions Court. The applicant's counsel applied under s. 311 of the Criminal Procedure Code for a stay of execution pending appeal and that bail be granted until the outcome of the hearing of the appeal. The prosecution objected and the learned President accordingly disallowed the application. The applicant sought by Notice of Motion for stay of execution of the sentence pending hearing of the appeal.

Held: a matter like this particular case ought not to have come before this court but such application could have been granted by the court of first instance. The application for a stay of execution would be granted and the applicant should be released on bail in the sum of $3,000 with 2 sureties.

Case referred to:

(1) *Set Kon Kim* v. *Public Prosecutor* F.T.C. Appn No. 3 of 1983 (to be reported).

CRIMINAL APPLICATION.

Gurbakhash Singh for the applicant.

Phang Ah Hee (Deputy Public Prosecutor) for the respondent.

Mohamed Dzaiddin J. (delivering oral judgment): This is yet another application by way of Notice of Motion to this court for stay of execution of the sentence pending hearing of the appeal. The applicant was charged for an offence under section 4(a) of the Prevention of Corruption Act 1961, and at the conclusion of the case, the learned President, Sessions Court, Kuala Lumpur, convicted and sentenced him to three years' imprisonment. The applicant's counsel then applied under section 311 of the Criminal Procedure Code for a stay of execution pending appeal and that bail be granted until the outcome of the hearing of the appeal. The prosecution objected and the learned President accordingly disallowed the application.

I do not know the reason why the learned President has refused this application. The only conceivable reason I could think of was that she has imposed a prison sentence against the applicant. It is well settled that the granting of bail by the lower Court is a matter of discretion of the Magistrate or President concerned. However, it has been stated on numerous occasions that the consideration which should guide the subordinate courts in granting or refusing bail pending appeal in cases where a term of imprisonment has been imposed are as follows:–

(1) gravity or otherwise of the offence;

(2) the length of the term of imprisonment in comparison with the length of time which is